FEDERAL JAYA SDN BHD

v.

DARUS DIN

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO: 22-98-98]
31 OCTOBER 1998

LAND LAW: *Caveat - Application for extension - What must be shown - Delay by caveator in taking legal proceedings to enforce rights - Enforceable rights time barred - More than two-year lapse between entry of caveat and institution of proceedings to enforce rights - Whether delay unreasonable - Whether balance of convenience in favour of caveator - Whether caveat ought to be extended*

LAND LAW: *Caveat - Application for extension - Unreasonable delay on part of caveator in taking legal proceedings against caveatee - Whether sufficient to resist application*

This was an interlocutory application by the plaintiff to extend the life of caveats lodged on land belonging to the defendant ('the said land'). In May 1989, the plaintiff entered into a joint venture agreement with the defendant to develop the said land. Contrary to this agreement, the defendant, in August 1989, refused to sign certain building plans prepared for submission to the local authority. Further, the defendant entered into another joint venture agreement with a third party sometime in 1995/96. As a result, the plaintiff entered private caveats against the said land in February 1996 and, in May 1998, the plaintiff instituted an action against the defendant for breach of the joint venture agreement.

In opposing the plaintiff's pending action and this application, the defendant claimed that the plaintiff was time barred by reason of s. 6(1) of the Limitation Act 1953.

Held:

[1] The refusal of the defendant to sign the building plans in August 1989 amounted to a breach of the joint venture agreement. Thus, the plaintiff had a cause of action against the defendant for breach of contract at that point in time.

[1a] For the purpose of calculating the period of six years, time began to run from August 1989 and thus the six-year period expired on August 1995. The plaintiff, however, filed the suit for breach of contract only in May 1998, ie, almost seven years later. Thus, limitation had set in.

[2] In an application by a registered landowner (the caveatee) for the removal of a caveat registered on his land title, the caveator desirous of maintaining the caveat must show the court that, as between him and the caveatee, there is a serious issue to be tried in relation to the land involving a claim by the caveator. The issue must be confined to one of those claims specified in s. 323 of the National Land Code 1965.

[2a] Although this was an application by the caveator for the maintaining of the caveats, the same principle applies.

[3] A caveator, apart from satisfying the court as to the existence of a triable issue, must also go on to satisfy the court that on the balance of convenience it would be better to maintain the caveat until the disposal of the action.

[4] For a court to hold that the balance of convenience lies in favour of the caveator, the caveator must satisfy the court that he has taken prompt legal proceedings to enforce his right.

[4a] In the present case, the plaintiff did not institute any legal proceedings to enforce his rights for almost seven years from the date when the cause of action accrued and hence limitation had set in. Even taking the date of the entry of the caveats as the starting point (ie February 1996), there had been a delay of about two years and three months. Thus, either way there had been a long and unexplained delay.

[5] In resisting the plaintiff's interlocutory application to extend the life of the caveat, it was not necessary for the defendant to show that he had pleaded the Limitation Act and that he would likely succeed on that plea. It was sufficient for the defendant to show that there had been an unreasonable delay on the part of the plaintiff in taking legal proceedings against him. However, by pleading the Limitation Act, the defendant's contention that the balance of convenience should not be in the plaintiff's favour and that the *status quo* should not be maintained was considerably strengthened.

Per curiam:

[1] Once a caveator has succeeded in showing the court that there is a serious issue to be tried, then, in the absence of special circumstances, the balance of convenience will normally be in favour of leaving the caveat in existence until the disposal of the action.

[Application dismissed with costs.]

Cases referred to:
Credit Corporation (M) Bhd v. Fong Tak Sin [1991] 2 CLJ 871 ***(refd)***
Eng Mee Yong v. Letchumanan [1979] 2 MLJ 212 ***(refd)***
Suharta Development Sdn Bhd v. Ho Lik Sdn Bhd [1994] 1 CLJ 407 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6(1)
National Land Code 1965, ss. 323, 326(1), (1A), (1B), 327(1)

Reported by S Dharmendran

JUDGMENT

Hishamudin Yunus J:

The plaintiff company is a property developer, whilst the defendant is a landowner. The subject matter of the case now before me are the land lots (hereinafter shall be referred to as "the land") belonging to the defendant, which are located in the Mukim of Alor Malai, District of Kota Setar, Kedah.

On 28 February 1996, as a result of a dispute between the parties regarding the land, the plaintiff entered caveats on the defendant's land titles.

The defendant, as the registered owner of the land, was unhappy over the caveats. So, invoking s. 326(1) of the National Land Code, he applied to the registrar of title for the removal of the caveats.

On 26 April 1998, the plaintiff, pursuant to the said application by the defendant, was served by the registrar of titles with Form 19C notices under s. 326 (1A) of the National Land Code, notifying the company of his (the registrar's) intention to remove the caveats within two months of the service of the said notices, unless the life of the caveats is extended by an order of the court.

This summons-in-chambers (encl. 2) is, therefore, an interlocutory application by the plaintiff company for the extension of the life of the caveats. This application is made under s. 326(1B) of the National Land Code.

I shall first set out the provisions of s. 326 of the National Land Code. This section stipulates:

326. **Removal of private caveats by Registrar.**

(1) Any person or body whose land or interest is bound by a private caveat may at any time apply in Form 9 to the Registrar for its removal, and such application shall be accompanied by the prescribed fee.

(1A) On receiving any application for removal under this section, the Registrar shall -

(a) serve upon the person or body at whose instance the caveat was entered a notice of intended removal in Form 19C; and

(b) make an endorsement on the register document of title that the notice in Form 19C has been served on the person or body at whose instance the caveat was entered and of the date of such service, and shall sign and seal the endorsement.

(1B) In the case in which a notice of intended removal in Form 19C has been served under sub-section (1B), the caveat shall lapse and be of no effect at the expiry of two months specified in the notice unless before the expiry of that period the Registrar shall have been served with an order of the court extending the time provided in the said notice.

(2) The court may, on the application of any person or body on whom such a notice has been served under sub-section (1A) (and acting, if the circumstances so require, *ex parte*), from time to time extend the said period of two months; and the Registrar, on being duly served with an order of the court under this sub-section, shall make an endorsement on the register document of title of the date of service on him of the order and of the period of the extension, and shall sign and seal the endorsement.

(3) The Registrar shall remove any caveat pursuant to this section by canceling the entry thereof on the register document of title, and noting thereon the reason for the cancellation and the date thereof.

(4) Every cancellation under sub-section (3) shall be signed and sealed.

The brief background to the dispute is that on 3 May 1989 the plaintiff entered into a joint-venture agreement with the defendant to develop the land. Pursuant to the execution of the agreement, the plaintiff prepared the necessary building plans for submission to the local authority, but the defendant refused to sign the plans. Instead, in 1995/1996 the defendant entered into another joint venture agreement with a third party.

The plaintiff protested. In response, and as already been narrated, on 28 February 1996 the plaintiff entered private caveats against the land.

On 31 May 1998, the plaintiff filed the writ and statement of claim (ie, the present suit) (encl. 1). The plaintiff, in the statement of claim, alleged that the defendant, by the latter's refusal to sign the said plans, had committed a breach of the joint venture agreement (see para. 11 of the statement of claim). The plaintiff claims specific performance of the joint venture agreement as well as damages.

The present summons in chambers (encl. 2) was filed by the plaintiff on 1 June 1998.

The defendant filed his statement of defence on 8 June 1998 (encl. 9). The defendant, in his defence, pleads the Limitation Act 1953 (Act 254).

The defendant, in opposing the present interlocutory application, is also relying on the same ground ie, the Limitation Act 1953.

After hearing submissions, I had dismissed the application for the extension of the life of the caveats.

In my judgment, there is merit in the defendant's argument that the plaintiff's action, filed only on 31 May 1998, was time barred by reason of s. 6(1) of the Act. This provision states:

> **Limitation of actions of contract and tort and certain other actions.**
>
> 6.(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say -
>
> (a) actions founded on a contract or tort;
>
> ...

It is common ground that the refusal by the defendant to sign the building plans occurred in August 1989 (see para. 7 of the defendant's affidavit at encl. 10 and para. 13 [i] [c] of the plaintiff's *"Afidavit Jawapan Plaintiff"* at encl. 11). It is also common ground that this refusal by the defendant tantamount to a breach of the joint venture agreement. This being the circumstances of the case, in my judgment, a breach of the joint venture agreement between the plaintiff and the defendant was committed by the defendant in August 1989. It follows that at that point of time the plaintiff had already a cause of action against the defendant for breach of contract. In *Credit Corporation (M) Bhd v. Fong Tak Sin* [1991] 1 MLJ 409, Hashim Yeop Sani CJ ruled (at p. 411):

> From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all facts have happened which are material to be proved to entitle the plaintiff to succeed.

Thus, for the purpose of calculating the period of six years, time begins to run from August 1989; and this six-year period expired on August 1995. But, as has been pointed out, the plaintiff filed the suit for breach of contract and specific performance only in May 1998, that is to say, almost seven years later.

Now, there is an observation, which, I think, is pertinent for me to express. While, on the one hand, the plaintiff has clearly stated in para. 11 of its statement of claim that the breach was caused by the defendant's refusal to sign the building plan in August 1989, yet, on the other hand, in para. 6 of its second affidavit (encl. 11) supporting the present interlocutory application, the plaintiff alleged that the breach was caused by the defendant entering into another joint venture agreement with a third party in 1995/1996. In my judgment, this court cannot accept this later averment: the plaintiff cannot by affidavit evidence depart from its statement of claim: parties to an action are bound by their pleadings. I have so held in *Suharta Development Sdn. Bhd. v. Ho Lik Sdn. Bhd.* [1994] 1 CLJ 407.

On the law governing caveats, it is a basic principle that in a case where there is an application to the court by a registered landowner (the caveatee) for the removal of a caveat registered on his land title, the caveator desirous of maintaining the caveat must show the court that, as between him and the caveatee, there is a serious issue to be tried in relation to the land involving a claim by the caveator (see *Eng Mee Yong v. Letchumanan* [1979] 2 MLJ 212). The issue must be confined to one of those claims specified in s. 323 of the National Land Code (such as a claim to title or registrable interests by the caveator in respect of the land).

In *Eng Mee Yong*, the application for the removal of the caveat was made by the registered landowners pursuant to s. 327 of the National Land Code. Originally, in *Eng Mee Yong*, the application was made by the caveatees (the registered landowners) under s. 326(1) of the National Land Code. But the registrar was unable to serve notice of intended removal on the caveator as he could not be found. The caveatees were thus driven to proceed under s. 327(1) of the National Land Code for the removal of the caveat. This provision states:

> 327. **Removal of private caveats by the Court.**
>
> (1) Any person or body aggrieved by the existence of a private caveat may at any time apply to the court for an order for its removal, and the court (acting, if the circumstances so require, *ex parte*) may make such order on the application as it may think just.

In the case before me, however, it is not an application by the registered landowner to the court for the removal of the caveat under s. 327 of the National Land Code. Instead it is an application by the caveator (who has been served with a Form 19C notice) for the **maintaining** of the caveats. Be that as it may, the principle still applies. This is so because in *Eng Mee Yong* the Privy Council also ruled (at p. 215):

> So where, as in the instant case, the only parties to an application under section 327 are caveatee and caveator there is no difference between what the caveator must establish to obtain an extension of the caveat under section 326 and what he must establish to defeat the caveatee's application for removal of the caveat under section 327.

In the present case, the defendant has not advanced the argument that there is no any serious issue to be tried. Instead, he is contending that by reason of a long delay in taking legal action against him by the plaintiff, the latter is now time barred from pursuing its claim. Now, this being the position, I am constrained to consider this case on the assumption that, as between the parties, there is a serious issue to be tried concerning the land.

Now, on the question of delay, it is also ruled in *Eng Mee Yong* that the caveator, apart from satisfying the court as to the existence of a triable issue, must also go on to satisfy the court that on the balance of convenience it would be better to maintain the caveat until the disposal of the action. Lord Diplock, in delivering the judgment of the Privy Council, ruled (at p. 215):

> This is the nature of the onus that lies upon the caveator in an application by the caveatee under section 327 for the removal of a caveat: he must first satisfy the court that on the evidence presented to it his claim to an interest in the property does raise a serious question to be tried; and having done so he must go on to show that on the balance of convenience it would be better to maintain the *status quo* until the trial of the action, by preventing the caveatee from disposing of his land to some third party.

However, it is also ruled that once a caveator has succeeded in showing the court that there is a serious issue to be tried, then, in the absence of special circumstances, the balance of convenience would normally be in favour of leaving the caveat in existence until the disposal of the action.

The principle enunciated by the Privy Council goes on further to stipulate that for the court to hold that the balance of convenience should be in favour of the caveator, the caveator must also satisfy the court that he has taken prompt legal proceeding to enforce his right. In *Eng Mee Yong*, the Privy Council held (at p. 215):

> So too in an application by the caveator under section 327 for removal of a caveat, once the caveator* has met the requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence **until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract which he alleges had been tried.** (Emphasis added.)
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> [* In the law report it is written as "caveatee". I believe, this must have been a printing error.]

In the present case, taking the date when the cause of action accrued, that is, August 1989, there has been a delay of almost seven years, and as has been said, limitation has set in. And, even if one were to take the date of the entry of the caveats as the starting point (ie, 28 February 1996), still, there has been a delay of about two years and three months. Either way, there has been a long and unexplained delay.

I would like, however, to add that, in resisting the plaintiff's interlocutory application to extend the life of the caveat, as a matter of law it is not necessary for the defendant to show that he has pleaded the Limitation Act in his statement of defence and that he is likely to succeed on that plea. It is sufficient for the defendant to show that there has been an unreasonable delay on the part of the plaintiff in taking legal proceeding against him. However, by pleading the Limitation Act, as is done in the present case, it does considerably strengthen the defendant's contention that the balance of convenience should not be in the plaintiff's favour and that the *status quo* should not be maintained.

In conclusion, I hold that, even assuming that there is a triable issue, the plaintiff has failed to satisfy the court that the balance of convenience should be in its favour and that the caveats should remain. This is because of the long and unexplained delay in taking legal proceeding against the defendant. And the plaintiff's case is further weakened, where the delay is more than six years such that should the matter be allowed by the court to proceed to trial, the defendant is likely to succeed in his plea of limitation. Hence, the present application for extension is disallowed, and the caveats shall cease to have effect upon the expiry of the two-month statutory period.

Application dismissed with costs.